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No. 91-32

In The

Supreme Court of the United States

October Term, 1991

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should a verdict of attempt to monopolize under Section Two of the Sherman Act be sustained when the jury was permitted to infer specific intent and dangerous probability of success under *Lessig v. Tidewater Oil Co.*, but also adjudged defendants liable for monopolization, thereby finding (without the benefit of any inference) that defendants had actual monopoly power in the relevant market?

2. Under the rule articulated in *Copperweld Corp. v. Independence Tube Corp.*, can two corporations legally conspire when there is no evidence that they are subsidiaries of a common parent, when the uncontradicted evidence establishes that they do not operate as part of a common economic enterprise and when the two corporations were in fact competitors before entering into an unlawful horizontal market allocation?

3. Is the trial court's refusal to give a jury instruction on antitrust injury reversible error given that antitrust injury is a legal issue, not a factual issue, and when, in any event, the plaintiff established classic antitrust injury as a matter of law?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the Ninth Circuit were Larry McQuillan and Shirley McQuillan (dba Sorboturf Enterprises); Sorbothane, Inc.; BTR, Inc.; Hamilton-Kent Manufacturing Company; Kenneth M. Leighton; Spectrum Sports, Inc.; and Kenneth B. Leighton.

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To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondents Larry and Shirley McQuillan respectfully submit this Opposition to the Petition for Writ of Certiorari filed by Sorbothane, Inc., BTR, Inc., Hamilton-Kent Manufacturing Company and Kenneth M. Leighton:

OPINION BELOW

The Memorandum Decision of the Ninth Circuit Court of Appeals is attached to the Petition as Appendix A at pp. 3-33.

JURISDICTION

Respondents do not disagree with petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

> States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3. Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

INTRODUCTION

Petitioners Sorbothane, Inc. ("SI"), Hamilton-Kent Manufacturing Company ("H-K") and Kenneth M. Leighton ("Leighton Senior") identify three issues they claim justify certiorari in this case. However, in both their "Questions Presented" and substantive arguments, petitioners either misrepresent the operative facts or misstate the law in their effort to manufacture an issue worthy of Supreme Court review. In fact, the Memorandum Decision in this case raises no such issue. Moreover, no issue petitioners raise is even dispositive of the case.

Petitioners' first issue is whether an attempt to monopolize finding can be sustained when the "jury has not been charged that it must find either specific intent or dangerous probability of success." This issue is not dispositive of this case since petitioners were also found

liable on multiple Sherman Act Section One and Two claims and RICO claims, all of which support the trebling of damages. More importantly, petitioners misrepresent the record. The jury *was* instructed that it had to find specific intent and dangerous probability of success on the attempt to monopolize claim. It was merely instructed that it was *permitted* to infer these elements from petitioners' predatory conduct under *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

Petitioners make much of the alleged need to disapprove the *Lessig* rule. However, the *Lessig* inference was unnecessary to the attempt to monopolize finding. In addition to finding petitioners liable for attempt to monopolize, the jury found them liable for monopolization under Section Two. That latter finding required the jury to define the relevant market and conclude (without the benefit of the *Lessig* inference) that petitioners had monopoly power in that market. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). Thus, the inference *Lessig* permits was wholly unnecessary to the jury's finding of liability under Section Two. Accordingly, whether or not the *Lessig* rule should be reevaluated by this Court, it would not be appropriate to do so in this case.

As their second "question," petitioners ask whether "concerted activity between two wholly-owned subsidiaries of a common ultimate parent" can violate Section One of the Sherman Act under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). This argument is relevant to only one of the two Section One claims on which petitioners were found liable – the horizontal

market allocation claim.[1] More importantly, there was no evidence that SI and Leyland (the two companies that agreed to geographically divide the world market) were subsidiaries of a common parent. In fact, the evidence established that the two companies were not sisters, although both may have been somehow remotely affiliated within the BTR "family" of 650 companies. In any event, even if the two companies had been wholly-owned subsidiaries of a common parent, the uncontradicted evidence was that all of the "BTR" units operated autonomously. Further, the two companies did not act at the common direction of a parent company; indeed, SI's license (from another BTR company upstream) directed it to sell Sorbothane "in all world markets." Significantly, the evidence established that before SI and Leyland divided up the world market, they were competitors. Thus, there is no legitimate *Copperweld* issue in this case.

Finally, petitioners ask whether a verdict based on an antitrust violation under the Sherman Act can be sustained in the absence of a jury instruction on the meaning of, and necessity for, antitrust injury. This issue only pertains to the antitrust claims and is irrelevant to the RICO claims. More importantly, and as petitioners themselves acknowledged in the pre-trial order, antitrust injury is a legal issue for the Court, not a factual issue for the jury. In any event, McQuillan established as a matter

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[1] The other Section One claim on which petitioners were found liable (Resale Price Maintenance) involved concerted activity by more than the two purportedly affiliated companies alleged to be incapable of conspiring.

of law paradigm antitrust injury. She proved that petitioners eliminated her source of Sorbothane and terminated her distributorship pursuant to a group boycott in furtherance of a *per se* price fixing scheme. The horizontal market allocation between SI and Leyland independently ensured that McQuillan, a consumer and potential competitor, had no alternate source of Sorbothane. This is classic antitrust injury. Neither *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990) nor any other case compels a contrary conclusion.

STATEMENT OF THE CASE

A. Procedural Background.

This is a lawsuit by Shirley and Larry McQuillan[2] d/b/a Sorboturf Enterprises for violations of state and federal antitrust laws, various RICO violations, state law unfair competition and interference with prospective advantage. All defendants appealed. In a Memorandum Decision,[3] the Ninth Circuit Court of Appeals affirmed each of the antitrust verdicts. Since it was unnecessary in light of these affirmances, the Ninth Circuit did not specifically address the multiple verdicts under RICO or the state law claims.

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[2] Since Shirley McQuillan was the central actor in the events preceding the filing of this lawsuit, and unless the context indicates otherwise, "McQuillan" in this brief refers to her.

[3] Petitioners erroneously refer to this unpublished disposition as an "opinion" throughout their petition.

B. Factual Background.

McQuillan will not repeat the comprehensive factual statement set forth in the Ninth Circuit decision. McQuillan (through her business, Sorboturf) was appointed by H-K as one of several regional distributors of Sorbothane[4] athletic shoe inserts. She also worked extensively to develop a Sorbothane horseshoe pad for which H-K promised her the national equestrian distributorship. In furtherance of petitioners' scheme to fix Sorbothane prices, and as a consequence of a horizontal market allocation between SI[5] and an English company, McQuillan's distributorship – and thus her ability to compete in the Sorbothane athletic insole market – was destroyed. The following summarizes the key facts underlying each antitrust violation on which the jury found petitioners liable:

1. *Vertical Price Fixing.* H-K's distributors were required to agree – and did agree – to sell to retailers at a fixed markup. H-K also required its distributors to "police" their retail customers to prevent any discounting at the retail level.[6] However, H-K knew that regional

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[4] Sorbothane is a patented visco-elastic polymer that, although a solid, absorbs energy like a liquid.

[5] BTR, Inc., through a subsidiary, owned H-K, which handled the American Sorbothane business. In 1982, BTR, Inc. established a new company, S.I., to which the Sorbothane business was moved. Thus, references are to H-K or, alternatively, SI, depending on the time frame. For purposes of this brief, the two corporations are interchangeable.

[6] H-K told distributors that any retailers caught discounting Sorbothane insoles were to be denied further Sorbothane shipments. Further, H-K warned distributors that violating the pricing agreement placed their distributorships in jeopardy.

distributors were violating the price fixing agreements. The only regional distributor who always enforced the price fixing agreements was Leighton Junior, son of Leighton Senior (President of H-K).

In January 1982, Leighton Senior, Leighton Junior, Laurene Heinsohn (SI's marketing manager) and John Burne met to discuss the "problem of control" with the regional distributors. SI had appointed Burne's company as the national Sorbothane medical distributor. It would be selling as "medical products" the same insoles the regional distributors were marketing as athletic insoles. However, the "medical" insoles could command much higher prices in the retail medical market. The regional distributors threatened both the high athletic insole prices and the even higher "medical" insole prices by violating the price fixing agreements. A single national athletic distributor – especially a loyal and enthusiastic price fixer like Leighton Junior – would ensure high prices in both the athletic and medical markets. Accordingly, the group decided to replace the regional distributors with Leighton Junior.

Pursuant to that January 1982 meeting, SI terminated two distributors on the pretext of credit problems. However, McQuillan had excellent credit. Thus, SI tried to harass her into relinquishing her athletic distributorship.[7] It also tried to entice – and then threaten – her to relinquish her athletic distributorship in exchange for the

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[7] For example, it placed new, onerous, and undeserved credit limits on McQuillan, withheld her shipments of product, and gave her such short notices of price increases that she could not pass the increases on to her customers.

national equestrian distributorship she had already been promised. When those efforts failed, SI, without explanation, terminated McQuillan's distributorship (thereby eliminating her source of Sorbothane) in August 1983.

2. *Horizontal Market Allocation.* When SI terminated McQuillan's distributorship, she attempted to keep her distributorship alive by purchasing Sorbothane manufactured by the other licensed manufacturer, an English company called Birmingham and Leyland ("Leyland"). However, SI and Leyland had entered into what they described as a "harmonious marketing relationship." Under this agreement, SI would not sell into Leyland's territory (Europe) and in exchange, Leyland would not sell into SI's territory (United States and Canada). Thus, when SI eliminated McQuillan's source of Sorbothane, she had no alternate source. Her distributorship – and any competitive threat to SI she would have posed – was finally destroyed.

3. *Monopoly.* Sorbothane is a unique material and unlike any other material from which shoe inserts are made. Petitioners' own documents reflect that there was no substitute for Sorbothane. Moreover, H-K (and then SI) was the only manufacturer of Sorbothane athletic shoe inserts in the United States. Thus, H-K could and did absolutely control Sorbothane prices and exclude competition.

4. *Conspiracy to Monopolize.* The jury, properly instructed, found that petitioners' plan to eliminate the regional distributors in furtherance of their price fixing scheme also constituted conspiracy to monopolize the Sorbothane shoe insert market.

REASON FOR DENYING THE PETITION

A. The Petition for Writ of Certiorari Fails to Meet the Supreme Court Rule 10 Standard of Presenting Special or Important Reasons for Review on Writ of Certiorari.

Under Supreme Court Rule 10, this Court grants certiorari "only when there are special and important reasons therefor." This case does not merit Supreme Court review for several reasons. First, this Memorandum Decision is unpublished. Thus, it does not create a "conflict" with any other case because it is not precedent. A grant of certiorari could only affect these parties and do no more than correct an error – if one existed – by the lower court.

Additionally, none of the issues raised by the Petition are dispositive of the case. Indeed, only one of the arguments – antitrust injury – applies to all of the antitrust claims. Since the resolution of petitioners' issues will not affect the ultimate outcome of the case, this Court should deny the petition for certiorari. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964).

Finally, each of petitioners' purported legal issues in reality turns on the specific facts of this case. For example, the *Lessig* argument ignores the jury's finding – based on substantial evidence – that petitioners were liable for monopolization. The *Copperweld* argument hinges on the false premise that SI and Leyland were wholly owned subsidiaries of a common parent. The antitrust injury argument (in addition to ignoring that it is not a jury issue) ignores that McQuillan's injury was classic antitrust injury. Properly understood, none of the petitioners'

alleged issues can be meaningfully analyzed without reviewing and reweighing the relevant evidence. However, "(w)e do not grant a certiorari to review evidence and discuss specific facts." *Superintendent v. Hill*, 472 U.S. 445, 461 (1985).

B. McQuillan Established the Relevant Market and SI's Market Power; The *Lessig* Inference Was Unnecessary to the Verdict and Does Not Furnish a Basis for the Grant of Certiorari.

Petitioners argue that the Ninth Circuit's affirmance of the attempt to monopolize claim "can only be rationalized with the assumed validity of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964)." Thus, petitioners argue, this Court should grant certiorari specifically to disapprove the *Lessig* rule. This argument applies only to the attempt to monopolize claim. Thus, even if this Court agreed with petitioners' *Lessig* argument, it would not affect the other antitrust claims or the RICO claims.

Contrary to petitioners' assertion, the jury was instructed that McQuillan had to prove the following elements by a preponderance of the evidence to establish attempt to monopolize:

> 1. That the defendants had a specific intent to achieve monopoly power in the relevant market;
>
> 2. That the defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent;
>
> 3. That there was a dangerous probability that defendants could sooner or later achieve their goal of monopoly in the relevant market;

> 4. That the defendants' conduct occurred in or affected interstate commerce; and,
>
> 5. That the plaintiff was injured in its business or property by the defendants' exclusionary or restrictive conduct.

The jury was further instructed that "(i)f plaintiff has shown that defendants engaged in predatory conduct you may infer from the evidence the specific intent and the dangerous probability elements of the offense, without any proof of relevant market or the defendants' market power." This instruction was consistent with *Lessig*.

More importantly, the *Lessig* inference was unnecessary to the verdict on the attempt to monopolize claim because the jury found petitioners liable for monopolization as well. The jury was properly instructed in connection with that claim to define the relevant market and determine whether petitioners had market power in that market. Of course, these are issues of fact for the jury to determine. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962). By finding that defendants violated Section Two of the Sherman Act, the jury defined the market and found that defendants had monopoly power in that relevant market.[8] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Thus, the Ninth Circuit's citation of *Lessig* in its unpublished Memorandum Decision hardly creates

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[8] Petitioners do not assert in their Petition (nor could they) that there was insufficient evidence to support the jury's finding on the monopoly claim. Sorbothane athletic shoe inserts were a single product submarket. Further, H-K (and then SI) was the only manufacturer of Sorbothane insoles in the United States. SI's market allocation agreement with Leyland further solidified SI's market power in the United States.

an appropriate opportunity for this Court to disapprove the *Lessig* rule. If this Court believes that the *Lessig* rule should be reviewed, it should do so in the context of a case where application of the rule affects the outcome.

C. The Evidence in This Case Disproves the Existence of a Legitimate *Copperweld* Issue.

Petitioners argue that this Court should grant certiorari because concerted activity between two wholly-owned subsidiaries of a common ultimate parent cannot violate the Sherman Act under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The *Copperweld* argument pertains only to the horizontal market allocation claim; the other antitrust claims either do not require concerted activity (monopolization and attempt to monopolize) or involved more than the two companies petitioners now claim are subsidiaries of a common parent (resale price maintenance and conspiracy to monopolize).

Copperweld held that a parent and wholly-owned subsidiary cannot conspire. Petitioners argue that the *Copperweld* reasoning extends to "two corporations ultimately owned by the same parent." However, *there was no evidence that SI and Leyland are subsidiaries owned by the same parent*. In fact, the evidence was that SI and Leyland are *not* sister corporations. Leyland is a British corporation not owned by BTR, Inc. (the grandparent of SI) or any of BTR, Inc.'s subsidiaries. Further, BTR, Inc. did not own shares of Leyland which, in turn, was a sole subsidiary of

BTR, Ltd., a mere holding company.[9] If petitioners had a valid defense based on the fact that SI and Leyland were commonly owned by the same parent, they could have (and should have) proved that relationship at trial. To the extent that there was evidence about the relationship of SI and Leyland,[10] it flatly contradicts the notion that the two companies were subsidiaries of a common parent.

Even if the evidence established some remote relationship between Leyland and SI, and even if the *Copperweld* rule extends beyond the parent/subsidiary situation, the uncontradicted evidence established that SI and Leyland did not function as part of a coordinated business enterprise.[11] SI's own evidence was that the 650 companies within the BTR family operate autonomously, *not* as a single economic enterprise and *not* under any common direction. Significantly, SI's sublicensor, BTR Development Services, Ltd., did not allocate any limited geographic market to SI, but rather directed SI to sell Sorbothane "in all world markets." Similarly, Leyland's license did not restrict it from selling into the United

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[9] A chart acknowledged by BTR, Inc. President John Cahill as showing the BTR, Inc. family does not reflect any relationship between Leyland and either BTR, Inc., S.I. or H-K.

[10] Indeed, the only evidence of even a remote affiliation between Leyland and SI was a reference by Maurice Hiles, Sorbothane inventor and *not* an officer or director of any BTR company, that BTR, plc is a British Holding Company that owns all the shares of BTR Companies. Significantly, John Cahill – Chief Executive of BTR, plc by the time of trial – came from London to testify on behalf of petitioners and never testified about any relationship at all between SI and Leyland.

[11] *Copperweld* views the "coordinated activity" of a parent and its wholly-owned subsidiary as a single economic enterprise because the two have a complete unity of interest.

States. Had the ultimate BTR holding company (presumably BTR, plc) intended to divide up the world market between SI and Leyland, it would have done so in the sublicenses given to each company. Instead, the BTR organization (assuming it had the ability to give common direction) clearly intended that SI operate as an economic unit separate from Leyland and sell worldwide. Indeed, evidence relating to earlier transactions with Frelen and Nike showed that SI and Leyland in fact were competitors before they unilaterally allocated the world market. Such anticompetitive conduct is not permissible simply because somewhere upstream there may be a common holding company that owns the shares of corporate conspirators.

Thus, this case raises no legitimate *Copperweld* issue. The evidence disproves both common ownership of SI and Leyland and that they operated as a coordinated economic enterprise. The jury correctly rejected the *Copperweld* defense.

D. Antitrust Injury is a Legal Issue, Not a Factual Issue for the Jury; In Any Event, McQuillan Established Antitrust Injury as a Matter of Law.

Petitioners also urge that the District Court should have instructed the jury on antitrust injury and that the Ninth Circuit should have reversed under *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 110 S.Ct. 1884 (1990).[12] As

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[12] Petitioners do not challenge (nor could they) the jury's factual conclusion that the destruction of McQuillan's business directly and proximately resulted from petitioners' *per se* antitrust violations.

petitioners themselves concede, the antitrust injury requirement is a standing issue and means that the plaintiff's injury must be the type the antitrust laws were designed to prevent.

Whether there is antitrust injury is a question of law for the court to decide after balancing policy factors. *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Assoc. General Contractors of California v. Calif. State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Indeed, petitioners fully recognized before trial that antitrust injury is a legal issue. The pre-trial order (signed by petitioners' counsel) identifies as "issues of law" the following:

> A. Does Sorboturf Enterprises have standing to complain of the alleged federal antitrust violations?
>
> B. Did Sorboturf Enterprises suffer any injury by reason of the alleged violations of the federal antitrust laws?
>
> C. Is Sorboturf Enterprises' alleged injury of the type that federal antitrust laws are designed to prohibit?

There was no counterpart to these issues in the separate and distinct listing of "issues of fact." If petitioners thought antitrust injury was a factual question requiring a jury instruction, they would have identified the issue in the pre-trial order as a fact to be litigated at trial.

It is difficult to imagine how a jury could be instructed on antitrust injury. The inquiry focuses on "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and

in providing a private remedy under Section 4." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982). Petitioners do not quote the instruction they claim they requested. Nevertheless, do they seriously contend that a jury can determine whether a particular injury was in Congress' contemplation when it created a private remedy under the antitrust laws? That, obviously, is a legal issue for the court which here concluded there was antitrust injury.

In any event, McQuillan proved classic antitrust injury as a matter of law. She claimed and proved a single injury: The destruction of her business by the concerted refusal to sell her Sorbothane. This refusal facilitated petitioners' scheme to control Sorbothane prices. When a manufacturer, acting in concert with some of its distributors, eliminates another distributor in furtherance of a scheme to control prices, the resulting injury to the terminated distributor is antitrust injury as a matter of law. *United States v. General Motors Corporation*, 384 U.S. 127 (1966). *See also, Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982) ["where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely 'the type of loss that the claimed violations . . . would be likely to cause.' "]

McQuillan also prevailed on her horizontal market allocation claim, a separate and independent *per se* violation. After SI eliminated her source of Sorbothane, McQuillan sought an alternative source of Sorbothane. However, because of SI's "harmonious marketing arrangement" with Leyland, McQuillan had no alternative source of Sorbothane. McQuillan, a consumer and potential competitor, was unable to purchase Sorbothane

from a source that, but for the unlawful horizontal market allocation, would have been available to her. This is precisely the harm that the proscription on market allocations is designed to prevent.

Petitioners argue that the decision here is somehow inconsistent with *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S.Ct. 1884 (1990) which held that *per se* conduct does not presumptively result in antitrust injury to any particular plaintiff. However, as discussed below, McQuillan affirmatively established that her business and ability to compete were destroyed when SI illegally eliminated her source of Sorbothane. This was classic antitrust injury because the elimination of McQuillan's source of Sorbothane resulted from a concerted refusal to deal in the form of (1) a group boycott in furtherance of the resale price maintenance scheme, and (2) a horizontal market allocation between SI and Leyland.[13] *Atlantic Richfield's* only significance is its elimination of a presumption that, given the evidence in this case, is superfluous.

In any event, *Atlantic Richfield* is factually inapposite. In *Atlantic Richfield*, a competitor (USA Petroleum Company) sued ARCO for encouraging ARCO's dealers to match the lower prices of independent gasoline dealers.

[13] In their Motion to Reconsider before the Ninth Circuit, petitioners lamely tried to characterize this as a "dealer substitution" case to thereby argue that McQuillan's termination was actually pro-competitive. However, McQuillan's claim is not based on SI's substitution of one regional distributor for another. Rather, the claim is based on SI's plan to replace the regional distributors collectively with one national distributor to control Sorbothane prices.

ARCO's maximum price fixing scheme reduced prices and increased ARCO's market share. USA asserted that the maximum price fixing scheme ruined many independents, thereby injuring competition. The District Court granted summary judgment in favor of ARCO on the price fixing claim on the basis that USA had failed to demonstrate antitrust injury. The District Court also concluded that USA could make no showing of predatory pricing because, given ARCO's market share and the ease of entry into the market, ARCO could not exercise market power.

The Ninth Circuit reversed, holding that vertical, nonpredatory, maximum price-fixing agreements could result in "antitrust injury" and that such injury is presumed to flow from *per se* conduct. This court reversed, holding that antitrust injury must be proven, not presumed, and that USA, as a matter of law, could not establish antitrust injury. Here, by contrast, McQuillan established paradigm antitrust injury as a matter of law without regard to any presumption. *Atlantic Richfield* does not support – much less mandate – the granting of certiorari in this case.

Therefore, this issue does not merit Supreme Court review. Antitrust injury is not a question for the jury and no instruction was necessary or appropriate. In any event, McQuillan established classic antitrust injury as a matter of law.

CONCLUSION

Petitioners have not raised a single issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the Petition for Writ of Certiorari.

DATED: July 26, 1991

Respectfully submitted,

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